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UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

OAKWOOD HEALTHCARE, INC., Employer, and	Case No. 7-RC-22141
INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, Petitioner	
BEVERLY ENTERPRISES-MINNESOTA, INC., d/b/a GOLDEN CREST HEALTHCARE CENTER Employer And UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC Petitioner	Case Nos. 18-RC-16415 18-RC-16416
CROFT METALS, INC. Employer And	Case 15-RC-8393
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, Petitioner.	

OAKWOOD HEALTHCARE, INC.'S BRIEF IN RESPONSE TO THE NATIONAL LABOR RELATIONS BOARD'S JULY 24, 2003 NOTICE AND INVITATION TO FILE BRIEFS

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INTRODUCTION

On March 5, 2002, the National Labor Relations Board ("Board") granted Oakwood Healthcare, Inc.'s ("OHI") Request for Review of the Decision and Direction of Election issued by the Acting Regional Director ("ARD"), Region 7, on February 4, 2002. Specifically, the Board decided to review the ARD's finding that OHI's charge nurses are employees rather than supervisors within the meaning of Section 2(11) of the National Labor Relations Act ("NLRA" or the "Act").

On July 24, 2003, the Board issued a Notice and Invitation to File Briefs ("Notice") in Oakwood, Golden Crest Healthcare Center, and Croft Metals, Inc. In its Notice, the Board invited the parties and any interested amici to submit briefs addressing ten discrete issues relating to the application of 29 U.S.C. 152(11) ("Section 2(11)").

Oakwood submits this Brief in Response to the Board's Notice. Below is Oakwood's position on the ten issues identified by the Board and, where applicable, an analysis relating those positions to the facts in the Oakwood case. Since Oakwood thoroughly briefed its position in both its Request for Review and its Brief on Review, it will not reiterate its arguments in this Brief. Rather, Oakwood has set forth below only additional points related to the Board's questions.

DISCUSSION

1. **WHAT IS THE MEANING OF THE TERM "INDEPENDENT JUDGMENT" AS USED IN SECTION 2(11) OF THE ACT? IN PARTICULAR, WHAT IS "THE DEGREE OF DISCRETION REQUIRED FOR SUPERVISORY STATUS," I.E., "WHAT SCOPE OF DISCRETION QUALIFIES" (EMPHASIS IN ORIGINAL)? KENTUCKY RIVER AT 713. WHAT DEFINITION, TEST, OR FACTORS SHOULD THE BOARD CONSIDER IN APPLYING THE TERM "INDEPENDENT JUDGMENT?"**

As the Board certainly is aware, what does or does not constitute "independent judgment" as an indicia of supervisory status under Section 2(11) of the Act has been a matter of considerable debate. In NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001), the

Supreme Court, noting that while "independent judgment" is an "ambiguous term," struck down the Board's construction, which categorically excluded judgments based on one's "ordinary professional or technical judgment." Id. at 713. However, the Court left open the question of the degree of judgment that is required to meet the Section 2(11) threshold, noting, essentially, that the independence of judgment exercised might be proscribed by "detailed orders and regulations issued by the employer." Id. at 713-14.

The Board now calls upon Oakwood and amici to posit a test to determine whether one acts with the requisite degree of independent judgment. A tall order, indeed, and a reminder to practitioners of the difficult job the Board faces in wrestling with the issue. The Board has long articulated varying tests or standards delineating what is not independent judgment. But in defining exactly what is independent judgment, the understandable approach has been more of "we know it when we see it."

The most reasoned description of independent judgment was articulated by Member Cohen in dissent in Ten Broeck Commons:

> The essence of independent judgment is that the individual's actions are based on the thought processes of that individual, rather than on some outside force or person. Certainly, an individual who makes a 'personal judgment based on personal experience, training and ability' is making an independent judgment.

Ten Broeck Commons, 320 NLRB 806, 815 (2000) (Cohen, Member, dissenting). The "test," then, would be whether the individual in question is making decisions in one of the Section 2(11) areas of authority based on the individual's own thought processes, guided by experience, training and ability.

When applying this test, one factor to be evaluated is the extent to which the individual's decision-making authority is limited by "detailed orders and regulations issued by the Employer and other standard operating procedures." Dynamic Science, Inc., 334 NLRB No. 57 (2001). Obviously, where an individual simply announces decisions dictated by superiors or makes decisions by rote

application of detailed policies, an argument could be made that such an individual is not exercising independent judgment. An example of this type of employer constraint on decision-making is found in Dynamic Science, supra, where the Board held:

> The Employer's test leaders, along with the petitioned-for artillery testers, run tests of military artillery, weapons, and armaments for the United States Army. Each working day, a stipulated supervisor provides the test leaders with detailed assignment sheets. These sheets detail the test leaders' daily activities, including: where he will report to carry out the testing; to whom he will be reporting; which testers will be on his crew; and what equipment he and his crew will be testing. Upon reaching the assigned site, the test leader checks in with the on-site test director, who provides additional instructions, such as what equipment needs to be set up and where exactly the test is to be executed. Depending on the equipment being tested, the test director will even specify the distance between the equipment and the target. In setting up the equipment, the leader and his crew are also required to follow written standard operating procedures that are provided by the manufacturer at each test site. Although the Employer's test leaders are responsible for the safe execution of the tests, it is uncontested that it is the responsibility of all the testers, as well as the test leaders, to stop the testing procedure and call the safety office should a safety violation occur.
>
> Based on the foregoing, the Board agrees with the Regional Director's determination that the Employer has failed to sustain its burden establishing that the test leaders possess statutory supervisory authority in their direction of other employees. The evidence shows that the test leaders' role in directing employees is extremely limited and circumscribed by detailed orders and regulations issued by the Employer and other standard operating procedures. Consequently, the degree of judgment exercised by the test leaders falls below the threshold required to establish statutory supervisory authority. See Chevron Shipping Co., 317 NLRB 379, 381 (1995), cited with approval in Kentucky River.

The severe employer constraint discussed in Dynamic Science certainly is not present in the Oakwood case. Indeed, when looking at the assignment and direction done by Oakwood's charge nurses, one must ignore the realities of the life and death nature of their work, as well as the necessity for them instantly to draw upon their personal experience, training and ability in making decisions, to conclude that these decisions – even if guided by general policies and procedures – do not entail the exercise of independent judgment.

In Oakwood, the ARD concluded that, although the charge nurses assign and responsibly direct RNs, LPNs, nursing assistants, mental health workers and other nursing unit staff, the assignment and direction is done without the requisite "independent judgment." This finding is based on the ARD's determination that the charge nurses' assignment and direction are limited by "the superior's standing orders and the employer's operating regulations." Specifically, the ARD makes much of the fact that Oakwood has a policy governing the "Assignment of Nursing Personnel." As fully briefed in Oakwood's Brief on Review, this policy actually compels a finding that the charge nurses do exercise independent judgment.[1]

Oakwood's policies do not constrain the charge nurses' use of independent judgment, they mandate it. The Assignment of Nursing Personnel policy relied on by the ARD articulates various factors that the charge nurse must evaluate when making assignments. The policy does not dictate any given assignment, nor can it be applied by rote. Rather, the policy requires the charge nurse to evaluate factors such as patient acuity, staff ability, staff experience and staff personality when making and altering assignments. This is the essence of independent judgment –charge nurses must analyze these various factors and apply them to meet a patient's changing needs in an acute care hospital. These nurses are not determining who will build the widgets versus who will place them in boxes; they are determining and redetermining over the course of a shift who is best suited to care for often critically ill patients in the various units of an acute-care hospital. No policy exits, or could be devised, that could eliminate the need for

[1] It seems that with the reversals in NLRB v. Healthcare & Retirement Corp. of America, 511 U.S. 571 (1994), and Kentucky River, some may wish to overstate the impact of policies and procedures – establishing almost another categorical exclusion. This is simply not consistent with the Act. As the court held in NLRB v. Quinnipiac College, 256 F.3d 68, 75 (2nd Cir. 2001): "The existence of governing policies and procedures and the exercise of independent judgment are not mutually exclusive." The Fourth Circuit was more direct, holding: "The Board mistakenly assumes that because there is an established procedure for handling a particular scheduling situation, nobody is required to think." Glenmark Associates, Inc. v. NLRB, 147 F.3d 333, 341 (4th Cir. 1998).

independent judgment in making such decisions. As Member Cohen noted in dissent in Providence Hospital:

> My colleagues assert that a charge nurse exercises only a routine function when she assigns an employee to a patient or to a wing. I disagree. As my colleagues concede, such an assignment is based on an assessment of the employee's skills. That evaluation is largely a matter of subjective judgment. For example, the judgment that employee A works particularly well with elderly patients, or that employee B works particularly well with coronary patients, is not a judgment based upon adding up points on a numerical scale. Rather, the judgment is one of discretion, requiring the use of independent analysis and decision-making.

Providence Hospital, 320 NLRB 717, 737 (1996) (Cohen, Member, dissenting). This is a reality once not so foreign to the Board:

> In a nursing home servicing elderly and sick patients whose critical needs may momentarily require variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely.

Avon Convalescent Center, Inc., 200 NLRB 702, 706 (1972).[2]

When an individual exercises any of the twelve indicia of supervisory authority set forth at Section 2(11), based on her own thought processes, and guided by her own experience, training and ability, that individual unquestionably acts with independent judgment. This is no less true simply because the employer has established factors to be considered when making such decisions. Evaluating patients, and then assigning employees based on an assessment of their skills, personality and experience – as Oakwood's charge nurses must – is, quintessentially, an exercise of independent judgment.

[2] Obviously, this is doubly true in acute care hospitals, where the patient population is not simply "elderly and sick," but is, increasingly, acutely ill. Acute care hospitals provide emergency medical, intensive care and post-operative care to individuals with serious, often life-threatening injuries and conditions. Charge nurses are, quite literally, making life and death decisions.

2. WHAT IS THE DIFFERENCE, IF ANY, BETWEEN THE TERMS "ASSIGN" AND "DIRECT" AS USED IN SECTION 2(11) OF THE ACT?

Section 2(11) of the Act lists twelve distinct functions which, if performed by or effectively recommended by an individual, are conclusive as to that individual's supervisory status. This statutory "test" of supervisory status is "to be interpreted in the disjunctive," such that "'the possession of any one of the authorities . . . places the employee invested with this authority in the supervisory class.'" Providence Hospital, 320 NLRB at 725, quoting Ohio Power Co. v. NLRB, 176 F.2d 385, 387 (6th Cir. 1949). Certainly, it is beyond reasonable debate that the identification of twelve distinct factors – any one of which would compel a finding of supervisory status – means that each of the factors is distinct. Thus, to "assign" must be distinct from "responsibly to direct."

That these two indicia of supervisory status are distinct is reflected in the legislative history surrounding their creation. The "responsibly to direct" language was added to the Taft-Hartley legislation in the form of an amendment offered by Senator Flanders, who was concerned that the proposed definition (which already included "assign") covered "everything except the basic act of supervising." 93 Cong. Rec. 4804 (daily ed. May 7, 1947). Clearly, then, Senator Flanders sought to capture some function distinct from "assign" when he proposed the addition of "responsibly to direct."

In Providence Hospital, the Board gave consideration to the distinction between these functions, but, in the end, failed to posit a definition of either, let alone a precise explanation as to how they differ. Rather, the Board noted that Section 2(11) requires that any of the enumerated functions, to be indicative of supervisory status, must be performed with "independent judgment." The Board's foray into the "independent judgment" area led to the line of decisions which culminated in the Supreme Court's decision in Kentucky River.

Quite obviously, Congress has not defined what is meant by the terms "assign" and "direct." However, a fundamental tenet of statutory construction is that terms, when not defined, be given their ordinary and usual meaning. See Summit Valley Indus., Inc. v. Local 112, United Bd. of Carpenters and Joiners of America, 456 U.S. 717, 722 (1982). Here, the ordinary and usual meanings of the terms at issue suggest definitions that are wholly consistent with both common sense and workplace realities. Specifically, the dictionary definition of "assign" is "to appoint to a post or duty." Webster's Ninth New Collegiate Dictionary, Merriam-Webster (1990). To "direct" is defined as "to regulate the activities or course of," "to carry out the organizing, energizing, and supervising of," "to train and lead performances of," and "to point out, prescribe, or determine a course or procedure." Id.

In the workplace, to "assign," is to determine who works where, and does what, during a given period or shift. Certainly, the term also includes more general concerns, such as scheduling employees on given days and shifts, but the authority to "assign" cannot end there. It is upon the commencement of the work activities, when given employees must be divided among various duties and responsibilities, that the essential supervisory assignments must be made.

The Oakwood case, like others arising in the health care industry, provides a clear and seemingly undeniable example of what it is to assign staff. As fully detailed in Oakwood's Brief on Review, the charge nurses at Heritage Hospital are responsible for assigning RNs and other, less skilled, nursing unit staff to care for patients and perform other vital tasks in the acute care hospital. This is the essence of assignment as contemplated by the Act. As the Board held in Providence Hospital: "assignment" encompasses ". . . the assignment of an employee to a department or other division, or other overall job responsibilities." Providence Hospital, 320 NLRB at 727.

Indeed, the Board has never asserted that authority such as that exercised by Oakwood's charge nurses is not within the statutory definition of "assign." Rather, the Board has attempted variously to assert that the assignments themselves are not "in the interest of the employer" (see Healthcare & Retirement Corp., 306 NLRB 63 (1992) or, once that approach failed, that such assignments are lacking the requisite degree of independent judgment (see Kentucky River Community Care, Inc., 323 NLRB No. 209 (1997)). The Fourth Circuit noted this concession by the Board:

> In its arguments before us, the Board conceded that the LPNs had the authority to call CNAs in to work and to change their hall assignments at Cedar Ridge if circumstances dictated. The Board does not argue that this work did not constitute "assignment," one of the 12 listed supervisory activities under NLRA Section 2(11). The Board, however, asks us to accept that maintaining an appropriate staff level (and during that process evaluating whether particular patients on a floor may require additional medical attention) does not require the exercise of independent judgment.

Glenmark Associates, 147 F.3d at 341 (internal citations omitted).

In Providence Hospital, too, the Board conceded that a charge nurse who determines who among the various staff members will care for particular patients is engaging in assignment, as contemplated by the Act. Again, however, the Board in Providence Hospital sought to avoid the conclusion that such assignments confer supervisory status by holding that they lack the requisite exercise of independent judgment. Providence Hospital, 320 NLRB at 727. The same is true of the ARD's decision in the Oakwood case.

As Senator Flanders noted, direction of employees is the "basic act of supervising." 93 Cong. Rec. 4804 (daily ed. May 7, 1947). As noted in Providence Hospital, the Board has not, historically, sought to "refine the meaning of this statutory indicium." Providence Hospital, 320

NLRB at 728. Indeed, while many cases address what is not "responsibly to direct," little clear authority posits a simple definition of "direction."[3]

If to "assign" means to determine who works where and does what, "direct" encompasses the essential supervisory prerogatives of thereafter instructing employees as to such things as the manner, order and requirements of the work to be done. In an industrial setting, the assignment might be to determine which employee is to operate given machinery, such that the subsequent direction of that employee might dictate which jobs to perform on that machine, what order to perform them in and the best manner of completing them. Direction also logically entails orders to stop performing one task and to begin another. As the record evidence and the briefs make clear, there can be no doubt but that Oakwood's charge nurses "direct" the work of nursing unit employees.

3. WHAT IS THE MEANING OF THE WORD "RESPONSIBLY" IN THE STATUTORY PHRASE "RESPONSIBLY TO DIRECT"?

As previously noted, "the Board has only rarely sought to define the parameters of 'responsibly to direct.'" Providence Hospital, 320 NLRB at 728. The term "responsibly," however, is not ambiguous.

As the Sixth Circuit held in Ohio Power Co. v. NLRB, 176 F.2d at 387:

> To be responsible is to be answerable for the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity, and integrity, and is implied by power.

This definition of "responsible" has been echoed by other Courts of Appeals. See, e.g., NLRB v. KDFW-TV, Inc., 790 F.2d 1273, 1278 (5th Cir. 1986); Northeast Utilities Service Corp. v. NLRB, 35 F.3d 621, 625 (1st Cir. 1994).[4]

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[3] As will be discussed later herein, the Board has struggled not with what it is to "direct," but, rather, what is meant by "responsibly" to direct and what must be shown to establish that such direction is given with independent judgment.

[4] Similarly, Webster's Dictionary defines "responsible" as "liable to be called on to

To be "responsible," then, one must be accountable for his or her direction – or lack thereof – of other employees. This is precisely what the record evidence shows as to the Oakwood charge nurses. For example, each and every witness at the representation hearing (including those witnesses called by the union) agreed that, in their annual performance appraisals, nurses are evaluated on their "leadership" skills and, specifically, on their performance as a charge nurse. Moreover, charge nurses can be – and have been – disciplined for poor performance of their assignment function or other duties of the position. Clearly, Oakwood's charge nurses are responsible for properly assigning and directing their staff, and are held accountable if their assignments (or the performance of their staff) are not sufficient to ensure the completion of all necessary functions.

4. **WHAT IS THE DISTINCTION BETWEEN DIRECTING "THE MANNER OF OTHERS' PERFORMANCE OF DISCRETE TASKS" AND DIRECTING "OTHER EMPLOYEES" (EMPHASIS IN ORIGINAL)? KENTUCKY RIVER, AT 720.**

Opening the door to this distinction, the Court in Kentucky River suggested:

> Perhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*, as Section 152(11) requires.

Kentucky River, 532 U.S. at 720. This suggested distinction is apparently drawn from Providence Hospital, where the Board stated:

> The common theme of these and other similar cases is that Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position, such as the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to

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answer" and "able to answer for one's conduct and obligations." Webster's Ninth New Collegiate Dictionary, Merriam-Webster (1990).

> coordinate the activities of other employees with similar specialized skills and training.

Providence Hospital, 320 NLRB at 729.

Although far from clear, it appears that directing other employees is to tell them what to do and when to do it, i.e., "stop taking blood pressures and go give Patient X a bath." In other words, this is the quintessential act of responsible direction, or, as Senator Flanders termed it, "the basic act of supervising." In contrast, directing a lesser-skilled employee in the **manner of performance** of a task envisions a more hands-on, more task-specific function: "To take Patient Y's blood pressure, first wrap the cuff, then close the valve, then begin to inflate the cuff." This act, then, is to use one's greater skill, experience, and training to assist another in doing or learning how to do the job or task that they have been directed to perform.

Oakwood does not argue that the latter act always connotes supervisory authority.[5] Nor, indeed, does the latter have any bearing on the Oakwood case. Charge nurses at Heritage Hospital are not supervisors simply because they "show[ ] other employees the correct way to perform a task." Franklin Hospital Medical Center, 337 NLRB No. 132 (2002) (Bartlett, Member, concurring). Rather, as explained in Oakwood's Brief on Review and elsewhere herein, the Heritage charge nurses are supervisors because they assign and responsibly direct *other employees* within the meaning of Section 2(11) of the Act.[6]

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[5] However, Oakwood does not concede that such authority necessarily is insufficient to support a finding of supervisory status. See Public Service Co. of Colorado v. NLRB, 271 F.3d 1213, 1219-20 (10th Cir. 2001) (rejecting a categorical distinction between "directing employees as they go about their tasks and . . . directing the tasks themselves").

[6] To be clear, the ARD's decision in Oakwood was not based on a finding that Oakwood's charge nurses merely direct staff in the manner of performance of a task. The ARD conceded that the charge nurses both assign staff and direct staff. The decision turned, rather, on the ARD's conclusion that these Section 2(11) indicia are not exercised with sufficient "independent judgment."

5. **IS THERE TENSION BETWEEN THE ACT'S COVERAGE OF PROFESSIONAL EMPLOYEES AND ITS EXCLUSION OF SUPERVISORS, AND, IF SO, HOW SHOULD THAT TENSION BE RESOLVED? WHAT IS THE DISTINCTION BETWEEN A SUPERVISOR'S "INDEPENDENT JUDGMENT" UNDER SECTION 2(11) OF THE ACT AND A PROFESSIONAL EMPLOYEE'S "DISCRETION AND JUDGMENT" UNDER SECTION 2(12) OF THE ACT? DOES THE ACT CONTEMPLATE A SITUATION IN WHICH AN ENTIRE GROUP OF PROFESSIONAL WORKERS MAY BE DEEMED SUPERVISORS, BASED ON THEIR ROLE WITH RESPECT TO LESS-SKILLED WORKERS?**

The alleged "tension" between Section 2(11) of the Act (supervisory exclusion) and Section 2(12) (inclusion of professionals) certainly has been a topic of considerable discussion. Indeed, this "tension" has been so often cited that its existence is almost presumed. In fact, however, Section 2(11) and Section 2(12) are distinct, perfectly harmonious provisions.

With its origins in the Board's justifications for the now defunct "patient care analysis," at least as applied to charge nurse supervisory determinations,[7] the issue of tension between Section 2(11) and Section 2(12) has persisted as a means of justifying the almost categorical exclusion of nurses from the ranks of those deemed supervisors by the Board. The Act itself, however, reveals no such tension.

Section 2(12) of the Act states that a professional employee, subject to the coverage of the Act, is:

> Any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; . . . (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes . . . .

29 U.S.C. 152(12)(a). Section 2(11), on the other hand, identifies a disjunctive list of twelve kinds of authority that are indicative of supervisory status. Under Section 2(11), one is a

[7] See Health Care & Retirement Corp., 511 U.S. at 581.

supervisor who (1) possesses authority consistent with one of the twelve listed in the section; (2) exercises that authority with independent judgment; and (3) exercises that authority in the interest of the employer.

Simply, Section 2(12) describes the requisite characteristics of a professional vis-à-vis his relationship to his own work and duties. Section 2(11), quite distinctly, is concerned only with the authority one possesses vis-à-vis his relationship with other employees. Member Cohen stated this distinction with great clarity:

> Concededly, the phrase "independent judgment" in Section 2(11) of the Act is roughly mirrored by the phrase "discretion and judgment" in Section 2(12) of the Act. But, the difference between the two is substantial and real. The supervisor exercises independent judgment with respect to the functions listed in Section 2(11), and he or she does so vis-à-vis employees. By contrast, the professional exercises discretion and judgment with respect to the task that he or she performs.
>
> Thus, for example, the task of devising a patient treatment plan involves the use of professional judgment. The nurse who devises that plan is a professional employee. But, the nurse who then administers that plan may have to exercise supervisory responsibilities vis-à-vis employees. For example, the nurse must decide which of the various tasks (outlined in the plan) must be done first, and the nurse must then select someone to perform that task. In the words of Senator Flanders, the nurse must decide "what job will be undertaken next and who shall do it." In addition, the nurse must take steps to assure that the task is performed correctly. In the words of Senator Flanders, the nurse gives "instructions for its proper performance, and training in the performance of unfamiliar tasks."

Providence Hospital, 320 NLRB at 736-37 (Cohen, Member, dissenting).

With so much made of this apparent tension between Section 2(11) and Section 2(12), the answer to those who would find such a tension seems almost too elementary. Yet, it is the answer – as captured by the Second Circuit Court of Appeals:

> It may be the case that one who makes a judgment as to the need for certain actions based on specialized knowledge and experience is not a statutory supervisor. But where the responsibility to make such a judgment and to see that others do what is required by that judgment

> are lodged in one person, that person is a quintessential statutory supervisor.

Schnurmacher Nursing Home v. NLRB, 214 F.3d 260, 268 (2nd Cir. 2000).[8]

As to whether the Act contemplates a situation where an entire group of professional employees would be deemed supervisors, the answer is undoubtedly "yes." The Act contemplates that any individual exercising any of twelve indicia of supervisory status, with independent judgment and in the interest of the employer, is a supervisor. Should each person in a given job title or job class be charged with such authority by his or her employer, then each such person would be a statutory supervisor.

Such is the case, increasingly, with nurses. In its amicus curiae brief filed in aid of the Supreme Court's review of Kentucky River Community Care, Inc. v. NLRB, 193 F.3d 444 (6th Cir. 1999), the Society for Human Resource Management ("SHRM") provided the Court with a thorough and detailed analysis of the current financial and regulatory demands placed on health care providers. *Brief of Amici Curiae Society for Human Resource Management and American Society for Healthcare Human Resources Administration* at 15, NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001) (No. 99-1815). As the SHRM's brief detailed, increased demand for nurses, fewer available nurses and increasing economic pressures have caused hospitals and other healthcare providers to rely very heavily on nurses – not simply to care for patients, but to supervise the delivery of patient care by others. See id. at 15-16. Among the various findings cited by the SHRM in its exhaustive analysis is the following:

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[8] Moreover, even if such a tension were to exist, it is not, respectfully, the province of the Board or the courts to "remove" it from the Act. The language of Section 2(11) is far from ambiguous – an individual who exercises any of the enumerated functions, with independent judgment and in the interest of his employer is, as a matter of law, a supervisor. Frankly, the analysis ends there. Should Congress believe that this nearly six-decades-old test needs revision – due to "tension" or otherwise – Congress can act to remedy any ills it perceives in the law. As the Supreme Court held in Health Care & Retirement Corp., this alleged tension cannot be resolved "by distorting the statutory language . . . ." Id. at 581.

> [i]ncreased pressure to deliver cost-efficient care to patients with more serious and often multiple conditions has forced hospitals to redesign delivery of care and reassess the roles of all nursing personnel. RNs have moved from direct patient care to coordinating and supervising patient care in hospitals . . . . In some institutions, nurse assistants are assuming greater responsibility for direct patient care under RN direction.
>
> ***
>
> Registered nurses with advanced training and skills will [increasingly] be called on to fill roles that require professional judgment, supervision, and direction of the work of others . . . .

Id. at 15, quoting "A Committee of the Institute of Medicine, Charged by Congress with Investigating the State of Nursing in the United States."

In short, as health care staffing mixes become more dependent on lesser-skilled individuals, nurses are increasingly not simply the providers of patient care, they are the supervisors charged with ensuring the provision of appropriate patient care by others. If, in so doing, these nurses exercise Section 2(11) functions, then they are supervisors under the Act – be there one or one hundred of them in a given facility.

6. WHAT ARE THE APPROPRIATE GUIDELINES FOR DETERMINING THE STATUS OF A PERSON WHO SUPERVISES ON SOME DAYS AND WORKS AS A NON-SUPERVISORY EMPLOYEE ON OTHER DAYS?

It is well-settled that if an individual is shown to possess Section 2(11) supervisory authority, the frequency with which he exercises that authority does not impact the necessary conclusion that he is a statutory supervisor. See, e.g., E&L Transport Co. v. NLRB, 85 F.3d 1258, 1270 (7th Cir. 1996); Oil, Chemical and Atomic Workers, Int'l Union v. NLRB, 445 F.2d 237, 234 (D.C. Cir. 1971) ("once the existence of supervisory authority is established, the degree or frequency of its exercise is of little consequence"); Ohio Power Co., 176 F.2d at 388 (6th Cir. 1949) (Section 2(11) "does not require the exercise of the power described or all or any definite part of the employee's time"). With that said, however, the Board has over time developed and

applied varying standards to determine whether individuals possess supervisory authority with sufficient frequency to justify removal from the protections of the Act.

In Westinghouse and Electric Corp., 163 NLRB 723 (1967), the Board held that employees must spend at least 50 percent of their working time performing supervisory duties in order to qualify as supervisors within the meaning of the Act. In that case, a group of engineers was assigned to specific projects located on customer sites away from the workplace. Some of the engineers had supervisory authority, but only for particular projects and never with respect to unit employees. Moreover, the period of time when these engineers possessed supervisory authority was measurable and clearly demarcated.

Several years later, in Doctor's Hospital of Modesto, 183 NLRB 950 (1971), the Board placed certain limitations on the application of this "50 percent" rule. Specifically, the Board stated:

> The . . . criteria enunciated in Westinghouse do not apply to circumstances like the instant case, wherein the disputed individuals are performing both their allegedly supervisory and nonsupervisory jobs during the same workweek, in the same department with essentially the same complement of employees.

Id. at 951. In that case, the Board considered the employer's argument that individuals who served as relief head nurses two days per week and as staff nurses three days per week were supervisors. Although it eventually concluded that these individuals did not possess supervisory authority when functioning as relief head nurses, it did hold – in a passage particularly relevant in the Oakwood case:

> If the relief head nurses possess supervisory authority 2 days per week, they will be excluded from the unit, regardless of the fact that they spend a major portion of their time working in nonsupervisory jobs.

Id. at 951.

In Aladdin Hotel, 270 NLRB 838 (1984), the Board further articulated the circumstances under which the Westinghouse "50 percent" rule does not apply. In that case, the Board distinguished Aladdin Hotel from Westinghouse because the Aladdin Hotel employees spent a portion of time working and a portion of time filling in as supervisors during the same work period, in the same department, with essentially the same employees, and with no clear separation between their supervisory and nonsupervisory employees. Aladdin Hotel, 270 NLRB at 840. Under such circumstances, where the individuals at issue substituted for supervisors, the appropriate test is whether they spend a "regular and substantial portion of their working time performing supervisory tasks or whether such substitution is merely sporadic and insignificant." Id., citing Honda of San Diego, 254 NLRB 1248 (1981). Over the years, the Board has often applied this "regular and substantial" test in situations where the individuals at issue spend part of their working time substituting for conceded supervisors. See, e.g., Aladdin Hotel, 270 NLRB at 840 (employees who substituted for supervisors on an average of two times per month over preceding three months were supervisors within the meaning of Section 2(11) of the Act); Swift & Co., 129 NLRB 1391 (1961) (individual was a supervisor where he spent 15 percent of his worktime substituting for a supervisor); Sewell, Inc., 207 NLRB 325 (1973) (two individuals were supervisors where they substituted for supervisor one day every two weeks and two of eight working days, respectively).

Thus, when assessing supervisory status, the Board must consider whether the individual spends a "regular and substantial" portion of his working time in a supervisory role or whether the time spent supervising is too "irregular or sporadic" to exclude the individual from the protections of the Act. See Canonsburg Gen. Hosp. Ass'n, 244 NLRB 899 (1979) (individual who substituted for supervisor on her vacation time was not a supervisor within the meaning of the Act).

It is clear that Oakwood's nurses spend a regular and substantial portion of their time in the supervisory charge nurse role. The charge nurse does not "fill in" for some other supervisory employee. Rather, the registered nurses rotate, among themselves, the supervisory function. Although it varies by unit, Oakwood utilizes both permanent and rotating charge nurses (all of whom it was stipulated possess the same duties and authority). Clearly, the permanent charge nurses – who spend all of their working time in this supervisory role – exercise their supervisory authority on a regular and substantial basis. Moreover, as fully explained below in response to Question No. 7, those nurses who rotate through the charge nurse position do so with regularity and, therefore, must be considered supervisors within the meaning of Section 2(11) of the Act.

7. **IN FURTHER RESPECT TO NO. 6 ABOVE, WHAT, IF ANY, DIFFERENCE DOES IT MAKE THAT THE PERSON IN A CLASSIFICATION (E.G., RNS) ROTATE INTO AND OUT OF SUPERVISORY POSITIONS, SUCH THAT SOME OR ALL PERSONS IN THE CLASSIFICATION WILL SPEND SOME TIME SUPERVISING?**

Simply put, an individual is a supervisor if she satisfies Section 2(11)'s three-part test for supervisory status. Whether or not some or all of her co-workers in the classification also rotate into supervisory positions – and thereby satisfy the statutory requirements themselves – makes no difference. If all of the individuals in a given job classification rotate through supervisory positions (such that they spend a regular and substantial portion of their working time in supervisory roles), then all of these individuals are supervisors. The statute places no limitations on the number of employees in any given job classification who may function as supervisors.

In the Oakwood case, both permanent and rotating charge nurses are used throughout the hospital, and the parties stipulated that all charge nurses are vested with the same authority. Although a few of the nursing units utilize permanent charge nurses on some shifts, the testimony established that there are only twelve permanent charge nurses in the entire hospital. Moreover, even on units that utilize permanent charge nurses, these permanent charge nurses only work on one shift and only on 10 days in a 14-day period. This leaves four days every two

weeks when the charge position is filled by other RNs on a rotating basis even on units and shifts with a permanent charge. And, obviously the more common scenario is that charge nurse duties rotate among the RNs on a given unit.

Simply because many nurses rotate into the charge nurse position does not make these nurses any less supervisory under the Act. In Rhode Island Hospital, 313 NLRB 343 (1993), the Board considered the supervisory status of the employer's "laundry group leaders," who rotated into supervisory positions one weekend per month. In evaluating the rotating nature of the laundry group leaders' supervisory authority, the Board held:

> We find laundry group leaders to be statutory supervisors based on their regular rotation as a weekend supervisor. According to the record evidence, each group leader works one weekend every 4 weeks as the weekend supervisor
>
> * * *
>
> As this scheduled rotation as a supervisor every fourth weekend is not sporadic, but regular and substantial, the group leaders are excluded from the petitioned-for units as they are supervisors under Section 2(11).

Rhode Island Hosp., 313 NLRB at 349.

In the Oakwood case, the RNs who rotate into charge do so at least as often as the laundry group leaders in Rhode Island Hospital, who served in their supervisory capacity only one weekend per month. The record evidence is clear that the charge nurse rotation is regular, not sporadic. Although there is variance among the units in the manner of assignment (i.e., some unit managers designate charge on the master schedule while others allow the charge nurses themselves to devise a rotation schedule), the testimony clearly established that all eligible nurses rotate through charge on a regular basis. Accordingly, all of Oakwood's charge nurses – whether permanent or rotating – are supervisors within the meaning of Section 2(11) of the Act.

8. TO WHAT EXTENT, IF ANY, MAY THE BOARD INTERPRET THE STATUTE TO TAKE INTO ACCOUNT MORE RECENT DEVELOPMENTS IN MANAGEMENT, SUCH AS GIVING RANK-AND-FILE EMPLOYEES GREATER AUTONOMY AND USING SELF-REGULATING WORK TEAMS?

Developments in management may explain why, in recent years, certain industries have more or fewer Section 2(11) supervisors in given job classifications. However, that these trends explain results does not justify reliance on these trends to dictate results that are contrary to the plain language of the Act. In other words, current issues in healthcare are resulting in an increased reliance on nurses to perform supervisory functions. This trend explains why more nurses are Section 2(11) supervisors, but does not justify ignoring or contorting the language of the Act in such a way as to deny them supervisory status.

The text of the statute very clearly sets out a three-part test for determining supervisory status: individuals are statutory supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions, (2) they exercise that authority with independent judgment, and (3) they exercise that authority in the interest of the employer. See Kentucky River, 532 U.S. at 712-13. Although partisans on either side of the labor-management debate can argue that this statutory test results in too many or too few supervisors (as the case may be), the fact remains that this is the test articulated by Congress that both the Board and the courts are duty-bound to apply. Either an individual satisfies this three-part test (and is thereby deemed as supervisor) or she does not; the fact that she may or may not be part of a cutting-edge "self-regulating work team" is irrelevant if the statutory criteria are satisfied.

To be sure, employers today – particularly in the health care industry – are forced by economic realities to streamline operations. For example, as discussed previously herein, registered nurses are decreasingly relied on to provide direct patient care and increasingly relied on to supervise other employees in the delivery of patient care. If these nurses exercise Section 2(11) authority with independent judgment in the interest of their employer, they are supervisors

under the Act and their employer must be able to ensure their loyalty – the very purpose for which Section 2(11) was enacted. Should Congress believe that the Act somehow fails to properly account for some modern workplace reality, then Congress is free to amend the Act. Respectfully, unless and until that is done, the Board and the courts must apply the law as it is written.

Unfortunately, the Board has recently taken a contrary approach. In Mississippi Power & Light Co., 328 NLRB 965 (1999), the Board ruled that individuals who previously were considered supervisors within the meaning of the Act no longer were supervisors because of changes that had occurred in the industrial workplace. Specifically, the Board said:

> We believe that the Board and the courts must recognize these work force and workplace changes that are making the quasi-professional or quasi-overseer employee more common in the workplace. The prevailing conditions of employment in 1947, when Congress enacted Section 2(11), must be given due weight in determining whether an employee is a supervisor, but we would be remiss if we failed to take into account changing technologies, methods of production, and managing work. As an administrative agency, our task is, within the statutory framework, to keep abreast of changing conditions in the workplace and to determine how such changes affect traditional analysis. "Here, as in other cases, we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life."

Mississippi Power, 328 NLRB at 971 (internal citations omitted).

Not unexpectedly, courts have expressed disagreement with the Board's consideration of such "developments" in determining supervisory status. In Entergy Gulf States, Inc. v. NLRB, 253 F.3d 203, 210 (5th Cir. 2001), the Fifth Circuit rejected the Board's approach in Mississippi Power, concluding that supervisory determinations should be made through application of the appropriate statutory test, not through some analysis of the "modern workplace." On this point, the court was clear:

> Further, the Board's observation that modern "work force and workplace changes" make quasi-professionals and quasi-overseers

> more common cannot justify its policy change .... It is the specific facts, not the Board's perception of labor trends, that must determine how the relevant law applies.

Entergy Gulf States, 352 F.3d at 210. The Fifth Circuit was correct in its conclusion that changes in management styles or the workplace have no bearing on whether an individual meets the Section 2(11) supervisory test, and the Board should adopt this approach.

In a sense, the alleged "developments in management" considered by the Board in Mississippi Power, and at issue in this question (i.e., greater autonomy for rank-and-file employees and self-regulating work teams), are nothing more than workplace trends that serve to explain why more or fewer employees in a given industry are able to satisfy Section 2(11)'s three-part test for supervisory status. Again, these developments in management explain the results reached through application of the statutory test, but they cannot dictate those results.

And, just as changes in the workplace may increase the number of supervisors in some industries, they may result in fewer Section 2(11) supervisors in other industries. For example, in the health care industry, developments in the supply and demand for medical services, as well as economic pressures, have resulted in a situation where healthcare providers are left with no choice but to place increasing responsibility on nurses to supervise the delivery of health care. Because of changes that have occurred industry-wide, it is clear that nurses are exercising greater responsibility for supervising patient care personnel than ever before. As a result of these developments, more and more nurses will satisfy Section 2(11)'s three-part test for supervisory status (i.e., they will hold the authority to exercise at least one of the twelve listed supervisory functions with independent judgment and in the interest of their employer). Conversely, in some manufacturing settings, employee "teams" are, at times, replacing a layer of front line supervision, thereby reducing the number of individuals who meet the requirements of Section 2(11). In either of these cases, however, the Board ought not consider such industry trends in

conducting its supervisory status analysis. Each situation simply explains why, by virtue of the application of Section 2(11)'s three-part test, increasing numbers of individuals may or may not qualify as supervisors in a given industry or industry segment.

9. **WHAT FUNCTIONS OR AUTHORITY WOULD DISTINGUISH BETWEEN "STRAW BOSSES, LEADMEN, SET-UP MEN, AND OTHER MINOR SUPERVISORY EMPLOYEES," WHOM CONGRESS INTENDED TO INCLUDE WITHIN THE ACT'S PROTECTIONS, AND THE SUPERVISOR VESTED WITH "GENUINE MANAGEMENT PREROGATIVES." NLRB v. BELL AEROSPACE CO., 416 U.S. 267, 280-281 (1974) (QUOTING SENATE REPORT NO. 105, 80TH CONG., 1ST SESS., 4 (1947))**

In enacting Section 2(11), Congress evidently intended to distinguish between employees performing minor supervisory duties (not supervisors) and employees vested with genuine management prerogatives (supervisors). Only the latter were removed from the protections of the Act. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), reprinted in 1 Leg. Hist. 407, 410 (LMRA 1947). Specifically, the Senate Committee Report states:

> In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.

Id. Concerned that this language did not adequately distinguish between true supervisors and "minor supervisory employees," Senator Flanders proposed additional language to the bill, adding what would become the "responsibility to direct" language contained in Section 2(11). As Senator Flanders explained:

> . . . the definition of "supervisor" in this act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in the modern practice to a personnel manager or department. . . . In fact, under some management methods the supervisor might be deprived of authority for most of the functions enumerated [in Section 2(11)] and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged

> with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees," as enumerated in the [Senate Committee] report. Their essential managerial duties are best defined by the words "direct responsibly," which I am suggesting.

93 Cong. Rec. 4804 (daily ed. May 7, 1947) (statement of Sen. Flanders). With this language, Senator Flanders sought to distinguish supervisors from "minor supervisory employees" through an examination of each's ability to responsibly direct other employees based on his or her own personal and independent judgment. Thus, the distinction is clear: supervisors use independent judgment in responsibly directing other employees, while mere straw bosses or leadpersons do not. See Providence Hospital, 320 NLRB 717, 736 (1996) (Cohen, Member, dissenting).

Notwithstanding the clarity of this distinction, the Board often has held in recent years that charge nurses are the equivalent of "straw bosses" or "leadpersons." See, e.g., Northcrest Nursing Home, 313 NLRB 491, 494-95 (1993) ("Charge nurses in hospitals and nursing homes are, in our experience, on a par with 'leadmen' in other industries . . . ."). In taking this position, the Board has done little to define the terms "straw boss" and "leadmen," likely because defining these terms would clearly exclude charge nurses from their reaches. As set forth above, charge nurses in general – and Oakwood's charge nurses in particular – exercise independent judgment in assigning and responsibly directing other RNs and non-licensed personnel in the provision of patient care. For this reason, Oakwood's charge nurses are supervisors within the meaning of Section 2(11) of the Act and can be distinguished from "straw bosses, leadmen, set-up men, and other minor supervisory employees."

10. TO WHAT EXTENT, IF AT ALL, SHOULD THE BOARD CONSIDER SECONDARY INDICIA – FOR EXAMPLE, THE RATIO OF ALLEGED SUPERVISORS TO UNIT EMPLOYEES OR THE AMOUNT OF TIME SPENT BY THE ALLEGED SUPERVISORS PERFORMING UNIT WORK, ETC. – IN DETERMINING SUPERVISORY STATUS?

As set forth above, in order to be a supervisor, an individual must have the authority to engage in at least one of the twelve supervisory functions listed at Section 2(11) of the Act, including the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or adjust grievances.

In addition to these "primary indicia," the Board has, over time, articulated several other "secondary indicia," which may be considered in borderline cases to determine whether an individual is a supervisor. Some of these secondary indicia include ratio of staff to supervisors, attendance at management meetings, job description, job title, perception of other employees, amount of time spent performing unit work, whether the individual wears distinguishing clothing, and whether the individual receives a higher wage than other unit employees. See, e.g., Monotech of Mississippi v. NLRB, 876 F.2d 514, 517 (4th Cir. 1989) (collecting cases); The NLRB and Supervisory Status: An Explanation of Inconsistent Results, 94 Harv. L. Rev. 1713, 1716 (1981).

In the absence of evidence that an individual possesses one or more primary indicia of supervisory status, the secondary indicia are insufficient by themselves to establish supervisory status. See, e.g., Ken-Crest Services, 335 NLRB No. 63 (2001); Hausner Hard-Chrome of Kentucky, Inc., 326 NLRB 426 (1998); J.C. Brock Corp., 314 NLRB 157 (1994). However, in borderline cases – i.e., cases where the existence of one or more primary indicia is in dispute or is not clearly supported on the record – the Board will look to secondary indicia to sway its decision one way or the other.[9]

[9] At least one court has intimated that strong evidence of secondary indicia may alone suffice to establish supervisory status even in the absence of one or more primary indicia. See Poly-America, Inc. v. NLRB, 260 F.3d 465, 479 (5th Cir. 2001) ("In addition, supervisory status

Although the Board has articulated several secondary indicia, it is generally agreed that the ratio of staff to supervisors is among the most instructive of these indicia in charge nurse cases. In fact, the Seventh Circuit has gone so far as to describe ratio as one of the "guiding lights" in charge nurse cases, and several other Courts of Appeal rely heavily on this factor. See, e.g., Children's Habilitation Center, Inc. v. NLRB, 887 F.2d 130, 132 (7th Cir. 1989); Beverly California Corp. v. NLRB, 970 F.2d 1548, 1553 (6th Cir. 1992); Spentonbush/Red Star Co. v. NLRB, 106 F.3d 484 (2nd Cir. 1997). The Board has repeatedly looked to the ratio of staff to supervisors when considering whether charge nurses are supervisors. See, e.g., Wright Memorial Hospital, 255 NLRB 1319 (1981) (finding charge nurses supervisors where "to find them not to be supervisors would result in an unrealistic ratio"); Northwoods Manor, 260 NLRB 854 (1982) (stating "we also find it significant that if charge nurses are not supervisors an unrealistic supervisor-to-employee ratio would exist at the employer's facilities"). Consideration of the ratio of supervisors to employees in the Oakwood case – both with and without charge nurses included among the ranks of supervisors – is telling, and it supports a conclusion that supervisory status has been established.

At the representation hearing in this matter, Oakwood introduced evidence of the supervisor-to-employee ratio (assuming that charge nurses were not supervisors) on the day, afternoon, and midnight shifts over a three-week period in late 2001. This evidence demonstrates that Oakwood's charge nurses are supervisors; otherwise, the supervisor to staff ratio would vary as follows for each shift:

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may be found on the basis of various 'secondary indicia' of such authority . . . ."). Oakwood finds this position difficult to square with the plain language of the Act, which requires the possession of one of the twelve listed indicia.

Ratio of Supervisors to Staff

	High	Low
Day Shift	1:80	1:10
PM Shift	1:86	1:19
Midnight Shift	1:58	1:26

In addition to the sheer absurdity of the ratios if charge nurses are not supervisors, there are other factors to consider:

- The clinical managers and assistant clinical managers on the day shift are not doing any day-to-day supervision of the nursing units.
- Only one clinical supervisor (house supervisor) is working on each off shift, and that individual is responsible for the entire hospital, not just the nursing areas. This involves overseeing all aspects of the hospital, including staffing, housekeeping, kitchen, and maintenance, as well as nursing areas.

The evidence regarding the ratio of staff to supervisors in the instant case is compelling support for a finding that the charge nurses are supervisors under the Act.[10] If the charge nurses are not supervisors, the staff to supervisor ratio at Heritage would range from 10:1 to an incredible 86:1. Additionally, these figures include Heritage's clinical supervisor, who is responsible for all areas of the hospital – both nursing and non-nursing – and Heritage's clinical managers and assistant clinical managers who manage their areas and have no role in the day-to-day supervision of unit personnel. More so than in a factory, or even in other health care institutions (i.e., nursing homes), it is simply *unconscionable* to believe that the patient care areas of this acute care hospital are essentially unsupervised on the afternoon and midnight shifts and supervised at incredibly unworkable ratios even on the day shift.

In the Oakwood case, the Employer has clearly established that its charge nurses possess two primary indicia of supervisory status – the authority to assign and to responsibly direct other

[10] The Sixth Circuit has held that a 13:1 ratio "is no way to run a business of this type [nursing home]." Beverly California Corp., 970 F.2d at 1553. Certainly this is even more true in an acute care hospital.

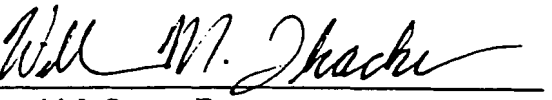
employees. However, even if this were a close case (which it is not), consideration of secondary indicia is appropriate and leaves no reasonable doubt as to the fact that the charge nurses at Heritage Hospital are supervisors within the meaning of Section 2(11) of the Act.[11]

CONCLUSION

Oakwood appreciates the difficulty faced by the Board in analyzing cases under Section 2(11), and is grateful for this opportunity to address the questions posed by the Board. Section 2(11) determinations long have been among the most contentious and politically-charged issues faced by the Board. Many commentators and partisans advance arguments in this area with an agenda of either broadening or narrowing the coverage of the Act. Oakwood has no such agenda, but asks only that the Act be applied as written. Under the plain language of the Act, the charge nurses at Heritage Hospital are supervisors, as they assign and responsibly direct employees, and do so with independent judgment in the interest of their employer.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: 

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[11] In addition to the ratio of supervisors to employees, Oakwood presented evidence that its charge nurses possess several other secondary indicia, including the following: charges nurses do substantially less patient care than staff RNs; charge nurses receive supervisory training; charge nurses receive higher hourly wages; charge nurses are identified in various job descriptions and other documents as the supervisors of the nursing unit personnel; and charge nurses cannot be pulled off of their assigned units. All of these facts further compel a conclusion that Oakwood's charge nurses are statutory supervisors.

CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, the undersigned hereby certifies that the original and 24 true and correct copies of Oakwood Healthcare, Inc.'s Brief in Response to the National Labor Relations Board's July 24, 2003 Notice and Invitation to File Briefs were served via Federal Express on this 18th day of September, 2003, upon the following:

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
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Washington, D.C. 20570-0001

And that one true and accurate copy was served by First Class Mail on the same date upon the following in the case of Oakwood Healthcare, Inc., Case No. 7-RC-22141:

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